



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

December 26, 2012

EDWARD A LAWSON
LAWSON LASKI CLARK & POGUE PLLC
PO BOX 3310
KETCHUM ID 83340

Re: Water Right Permit No. 37-8205

Dear Mr. Lawson:

The Department has reviewed the October 29, 2012 Technical Memorandum prepared by Brockway Engineering PLLC regarding a mitigation plan for the permit referenced above. As you know, one of the conditions of the amended permit was to provide mitigation or replacement water for consumption of water due to increased evaporation from a large heated pond. Mitigation is required to protect existing water users in the Big Wood Ground Water Management Area and the Snake River Moratorium Area. The Department provided one year and then an extension to October 2012 to allow the permit holder to collect additional data and submit an acceptable mitigation plan. The Department has concerns about the plan in general and about additional pond development at the place of use.

A review of some history of water right permit no. 37-8205 may be worthwhile for background in this discussion:

- The permit was approved by the Department in 1993 for heating and recreation use from a ground water source. The heating and recreation uses were described in conditions of approval as heating for 45 domestic dwellings, 115 townhouses, commercial office space, greenhouses, a gym, and in indoor pool; and recreational use for a horse center, an indoor pool, gym, and tennis facilities. An additional condition of the permit required that the water use shall be nonconsumptive and "...if use is found to be consumptive in the future, the consumption must be replaced or the user of the water must cease diversion until a plan of replacement is implemented."
- Proof of application of the water to beneficial use was originally due in 1996. Extensions of time to submit proof were granted, extending the proof due date to 2000, 2004, 2006, and lastly to October 2009. The Department granted the extensions based on litigation and for good cause shown.
- In October 2008, the Department received an application to amend permit no. 37-8205 to change points of diversion authorized under the permit and to add fish propagation use to the permit. Additionally, the permit holder provided a list of potential heating uses that might be developed under the permit. Those uses included heating of dwellings, greenhouses and other buildings, indoor bathing and swimming

pools, outdoor ponds, and ice/snow melting. In discussions with Brockway Engineering, the Department expressed concerns about increased water use due to the proposed changes. In February 2009, the permit holder revised the application and clarified that the amendment only proposes to change points of diversion under the permit. The Department approved the amended permit in March 2009. The permit holder filed a petition for reconsideration seeking to modify the conditions describing the allowed uses for heating and recreation. The Department denied the petition for reconsideration on the basis that such changes would require a revised application and publication to provide opportunity for protests to the changes.

- In May 2009, the Department received an application to amend permit no. 37-8205 to modify conditions of the permit describing the allowed uses for heating and recreation. The application included an engineering report that described specific uses to include heating of residences, a recreational pond, and a snow melting system. The Department corresponded with Brockway Engineering, agreeing that the proposed uses may be considered beneficial uses as heating and recreation. The Department requested information regarding consumptive use associated with the proposed changes.
- In October 2009, the Department received a Proof of Beneficial Use Statement and a beneficial use field report for permit no. 37-8205. In November 2009, the Department issued an order rejecting the field report and voiding the application for amendment. The Department rejected the field report on the basis that the report did not detail the extent of actual beneficial use during the authorized development period and because it did not adequately address compliance with conditions of the permit. The Department voided the application for amendment because the permit holder did not provide requested information regarding potential increased water use and consumptive use associated with the proposed changes.
- In December 2009, the Department received a Request for Extension of Time to submit proof of beneficial use. The extension request included information analyzing the potential for increased water use and consumptive use associated with the application for amendment of permit. The analysis indicated that the proposed amendment of the permit would increase consumptive use of water by 15.9 acre-feet per year for a 1.17 acre pond. The permit holder requested the extension to address mitigation requirements associated with the increase in consumptive use of water. The Department denied the request because the permit holder had previously received the maximum extensions provided by law. However, the Department agreed that it would withdraw the order rejecting proof of beneficial use and voiding the application for amendment if an acceptable field report was submitted to supplement the information already provided.
- In December 2009, the permit holder submitted an acceptable beneficial use field report, a Proof of Beneficial Use Statement, and information necessary for the Department to continue processing the application for amendment of permit. The Department withdrew its prior order rejecting proof of beneficial use and voiding the application for amendment of the permit.

- In November 2010, the permit holder submitted a plan to reduce the heat load of the pond and asserted mitigation credit for historic reduction of the Clarendon Reservoir footprint (covered under a separate water right). The reduced heat load would reduce the mitigation requirement to 5.4 acre-feet per year. The Department reviewed the proposal, including consideration of a previously approved transfer application associated with reconfiguration of Clarendon Reservoir. The transfer was protested and questions of forfeiture for rights associated with the reservoir were raised during the contested matter. A stipulated agreement between the transfer applicant and protestants limited the surface area and volume for reconfiguration of the reservoir. The transfer was approved in 2003 with a condition providing 3 years to accomplish the changes. Only a portion of the stipulated reservoir size was developed and the remaining balance was likely forfeited due to nonuse since 2003. The Department indicated that processing of the application for amendment would continue and, if approved, the Department would provide one year to allow the permit holder to submit an acceptable mitigation plan.
- The amendment of permit was approved in May 2011, authorizing heating and recreation use for a pond, ice and snow melting, and space heating. A condition of the permit requires that prior to continued diversion of water to the heated pond, mitigation or replacement water shall be provided for consumption of water due to increased evaporation from the pond.
- The Department has discussed other mitigation proposals with Brockway Engineering throughout the process. One proposal was to establish a domestic right under Idaho Code §42-111b for the evaporative losses associated with the heated pond. The Department explained that to qualify as domestic use, the total use cannot exceed the specified limits of 0.04 cfs and 2500 gpd. The total use of water associated with the heated pond includes the rate diverted into the pond for heating, not just the evaporative rate from the pond. See the Amended Final Order in the Matter of Application for Drilling Permit in the Name of Rotatrunk Ski Club, Inc. Numbered 849072, dated November 25, 2008 for discussion of domestic uses.
- In May 2012, the permit holder requested additional time to collect data to develop a more accurate estimate of evaporation and a better mitigation plan. The Department requested additional information, including identification of a source of water for mitigation. Brockway Engineering responded, identifying decreed right nos. 37-22128 and 37-4368B as possible sources of mitigation and provided some detail about data collection using a weather station on site. The Department granted an extension until October 31, 2012 to provide an acceptable mitigation plan for the permit. The Department's letter stated that if an acceptable plan is not submitted by that date, the Department will proceed to license the permit for only those developed uses that do not require mitigation.

The October 29, 2012 Technical Memorandum prepared by Brockway Engineering proposes to mitigate the consumptive portion of the heated pond by retiring a portion of water right no. 37-22128. Water right no. 37-22128 was decreed in the SRBA in 2011 for heating, recreation and irrigation (1.3 acres) purposes from a ground water source. Brockway Engineering has previously discussed this right with the Department as an option for mitigation. The Department responded that the right might be used for

mitigation, but an analysis of the historic consumptive use would be required to determine the quantity available for mitigation. The October 29, 2012 Technical Memorandum did not provide an analysis of the historic consumptive use under water right no. 37-22128. Department staff reviewed the water right file and found the historic use to include heating of some buildings, swimming pools and a bath house. The uses were essentially nonconsumptive, similar to the nonconsumptive portion of uses described under water right permit no. 37-8205. Additionally, in response to SRBA objections, the water right owner asserted that the heating and recreation uses under water right permit no. 37-22128 are nonconsumptive.

The October 29, 2012 mitigation plan proposes to retire a 0.33 acre pond, constructed in July 2011 and diverting geothermal water since August 2011. The pond was claimed to be developed under water right no. 37-22128. However, water right no. 37-22128 does not authorize storage of water in a pond. The Department has questions about the validity of the pond, and the increase in historic consumptive use of water under the decreed right.

The Department has been continually available and responsive to discuss options for mitigation and has provided the permit holder with ample opportunity to develop an acceptable plan. The recent direction taken by the permit holder raises questions about the permit holder's ability to provide meaningful mitigation and concerns about additional pond development at the place of use. Because you have requested to meet with the Department to discuss the mitigation plan, the Department will hold action on these matters until we've had a chance to meet and discuss further.

Department staff also reviewed the technical basis for new estimates of evaporation from the heated pond submitted by Brockway Engineering. The Department anticipated that site specific weather data would be used to "correct" long term weather data available from the Hailey station to estimate evaporation. Direct reliance on a short-term data set of weather parameters to determine evaporation at the site is inappropriate. Additional details and recommendations resulting from staff review are available in the water right file.

As noted, the Department is planning to meet with you to discuss the permit and mitigation requirements. You have requested a meeting on January 16 or 17. Garrick Baxter and I will be available to meet with you on either of those two days. I'll set up a conference room in our Boise office for January 16 at 11:00 a.m. Please let me know if another time would be more convenient for you to meet.

Sincerely,



Jeff Peppersack
Chief, Water Allocation Bureau

cc: Southern Region, IDWR